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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KATHLEEN VESTEVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA; THE
CENTERS FOR MEDICARE AND MEDICAID
SERVICES; CNI ADMINISTRATION
SERVICES, LLC,

Defendants.

) **Case No.: 3:08-cv-00027-L-JMA**

) **PLAINTIFF'S NOTICE OF MOTION TO**
) **AMEND COMPLAINT**

) DATE: June 2, 2008

) TIME: 10:30 a.m.

) JUDGE: Hon. M. James Lorenz

) TRIAL: None set.

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 2, 2008 at 10:30 a.m., or as soon thereafter as this matter may be heard before Hon. M. James Lorenz, in Courtroom 14, in the above-entitled court, located at 940 Front Street, San Diego, California, plaintiff will and hereby does, pursuant to Fed. R. Civ. P. 15, move for leave to file a First Amended Complaint to add a real party in interest. Good cause exists, and no prejudice to defendant will result.

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1 This motion is based on this notice of motion and motion, the attached points and
2 authorities, the Proposed First Amended Complaint, and all pleadings, papers and records in
3 this action, and any other such evidence and argument as may be presented to the Court in
4 connection with this motion.

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6 Dated: April 10, 2008

THE McCLELLAN LAW FIRM

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8 By: /s/
9 ROBERT J. CHAMBERS, II
10 Attorneys for Plaintiff
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MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
PLAINTIFF'S MOTION TO AMEND
COMPLAINT (Fed. R. Civ. P. 15)

DATE: June 2, 2008
TIME: 10:30 a.m.
JUDGE: Hon. M. James Lorenz
TRIAL: None set.

I. INTRODUCTION

Plaintiff, KATHLEEN VESTEVICH, brings this Motion to Amend her complaint for declaratory relief pursuant to Fed. R. Civ. P. 15 in order to add a single defendant: Secretary of the United States Department of Health and Human Services, Michael O. Leavitt, in his official capacity as a real party in interest. The complaint will remain the same in all other respects. A copy of Plaintiff's Proposed First Amended Complaint is attached as "Exhibit A."

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II. FACTUAL BACKGROUND

Plaintiff filed her complaint on January 4, 2008, alleging a single cause of action for declaratory relief. The United States answered the complaint on March 17, 2008. In its answer, the United States noted that Secretary of the United States Department of Health and Human Services, Michael O. Leavitt, in his official capacity, is the real party in interest in any dispute involving the Medicare program. [Doc. 3]. Plaintiff now seeks to add Mr. Leavitt, in his official capacity, as a real party in interest.

Two days after the answer was filed, Plaintiff's counsel contacted counsel for defendant to request a stipulation (joint motion) to file an amended complaint on the same grounds now before this Court. However, defense counsel was reluctant to do so. Several days later, Plaintiff's counsel renewed his request for a stipulation. Counsel for defendant did not respond. On April 8, 2008, Plaintiff's counsel sent a final request seeking a stipulation. However, defense counsel would not agree to join in a motion to amend. Thus, Plaintiff is forced to bring the instant motion to amend her complaint.

III. LEGAL DISCUSSION

Leave to amend may be sought any time before entry of judgment, and shall be freely given when justice so requires. (Fed. R. Civ. P. 15.) The policy favoring amendment should be applied with extreme liberality. (*Eminence Capital, LLC v. Aspeon, Inc.* (9th Cir. 2003) 316 F.3d 1048, 1051.) Here, Plaintiff should be permitted to amend her complaint in accordance with recently discovered information because there is no prejudice to defendant in doing so.

Plaintiff seeks leave to amend to add Secretary of the United States Department of Health and Human Services, Michael O. Leavitt, in his official capacity as a real party in interest. There are no other proposed changes to Plaintiff's complaint. By defendant's own admission, Mr. Leavitt is a proper party to this action. (See [Doc. 3]; *see also*, 42 C.F.R.

1 §421.5(b).)

2 Moreover, Plaintiff's proposed amendment will not prejudice defendant. No trial date
3 has been set, discovery has not yet commenced, and no scheduling conference has taken
4 place. The Early Neutral Evaluation is still over one month away, on May 12, 2008. Plaintiff
5 has not delayed in seeking this necessary amendment to her complaint, and respectfully
6 requests that the Court allow her to do so.

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8 Dated: April 10, 2008

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By: /s/
ROBERT J. CHAMBERS, II
Attorneys for Plaintiff

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EXHIBIT A

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KATHLEEN VESTEVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA; THE
CENTERS FOR MEDICARE AND MEDICAID
SERVICES; CNI ADMINISTRATION
SERVICES, LLC; MICHAEL LEAVITT,
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

Case No.: 3:08-cv-00027-L-JMA

**[PROPOSED] FIRST AMENDED
COMPLAINT FOR DECLARATORY RELIEF**

Plaintiff alleges as follows:

1. Plaintiff is a competent adult and resident of the State of California.

2. Defendant, the United States of America, is a sovereign nation.

3. Defendant, Centers for Medicare and Medicaid Services ("CMS"), formerly

known as Health Care Financing Administration, is a division of the Department of Health and
Human Services, the governmental agency that administers the Medicare program.

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1 4. Defendant, CNI Administration Services, LLC, is a limited liability company
2 registered in the State of Oklahoma and doing business in California. It was awarded a
3 contract by CMS on October 2, 2006 as a national Medicare Secondary Payer Recovery
4 Contractor ("MSPRC") for all post-payment recoveries.

5 5. Defendant, Michael Leavitt, is the Secretary of the Department of Health and
6 Human Services, the federal agency responsible for administering the Medicare program. The
7 Secretary administers the Medicare program through CMS.

8 6. Jurisdiction over this action is conferred by Title XVIII of the Social Security Act
9 (The Medicare Program) and pursuant to the recovery provisions of the Medicare Secondary
10 Payer legislation, 42 U.S.C. §1395y(b)(2)(B)(ii), 42 C.F.R. §411.24(b) and/or the Federal
11 Claims Collection Act, 31 U.S.C. §3711, *et. seq.*

12 7. Venue is proper in this Court inasmuch as a substantial part of the events or
13 omissions giving rise to the claim occurred in this district, or a substantial part of the property
14 that is the subject of the action is located within this district.

15 8. On January 21, 2006, plaintiff's husband, James C. Vestevich, was critically
16 injured and later died after the motorcycle he was riding was struck by another vehicle.

17 9. Plaintiff settled with Lorenzo Villa, the driver of the vehicle that struck Dr.
18 Vestevich, for the Progressive Auto Insurance policy limits of \$15,000 for the damages she
19 suffered as a result of her husband's death.

20 10. In addition, plaintiff had to pursue an underinsured motorist claim against USAA
21 Insurance, Dr. Vestevich's automobile insurance company. Plaintiff settled with USAA
22 Insurance for \$285,000.

23 11. Following the settlements with Progressive Auto Insurance and with USAA
24 Insurance, plaintiff attempted numerous times to determine whether defendants would be
25 asserting a lien and/or claiming a right of recovery on the wrongful death settlement and, if so,
26

1 that defendants waive any purported lien rights pursuant to *Fitch v. Select Products Co.* 36
2 Cal.4th 812, 819 (2005), and *California Code of Civil Procedure* sections 377.34 and 377.61.

3 12. Defendants ultimately asserted a lien in the amount of \$83,109.42. However,
4 defendants have wholly failed and refused to respond to plaintiff's request that they waive
5 their lien rights – despite plaintiff's repeated requests over the past ten months to do so.
6 Defendants' failure to respond is precluding the distribution of the settlement proceeds to
7 plaintiff.

8 13. A declaratory judgment is necessary to determine whether defendants are
9 asserting a claim for recovery of any benefits paid, and if so, to expunge any purported lien of
10 defendants on the basis of law and equity.

11 WHEREFORE, plaintiff prays for declaratory judgment against defendants as follows:

- 12 1. That the Court declare the respective rights and duties of plaintiff and
13 defendants;
14 2. That the Court declare, as a matter of law, defendants have no lien rights on the
15 wrongful death recovery obtained by plaintiff;
16 3. That plaintiff be awarded her costs, expenses and attorneys fees incurred
17 herein; and,
18 4. For such other and further relief as the Court deems just and proper.

19
20 Dated: April 10, 2008

THE McCLELLAN LAW FIRM

21
22 By: /s/
23 ROBERT J. CHAMBERS, II
24 Attorneys for Plaintiff
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